

LOMAX EXPLORATION CO.

IBLA 87-342

Decided October 7, 1988

Appeal from a decision of the State Director, Utah State Office, Bureau of Land Management, finding that certain of the gas vented or flared at wells operated by Lomax Exploration Company was avoidably lost. U-27041 etc.

Affirmed.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Royalties

A lessee is required to put into marketable condition, if economically feasible, all oil and gas produced from leased lands and conduct operations in such a manner as to prevent avoidable loss of oil and gas. Thus, a lessee is liable for royalty payments on oil or gas lost or wasted from a lease, when such loss or waste is due to the lessee's negligence or failure to comply with any regulation or properly issued order or citation.

2. Oil and Gas Leases: Generally -- Oil and Gas Leases: Royalties

The Department has the authority to issue NTL's for Federal or Indian leases. NTL-4A specifically governs the calculation of royalties or compensation for oil and gas which is lost by an operator. Under NTL-4A, oil well gas may not be vented or flared unless that activity is approved in writing by an authorized officer. For oil wells completed on or after Jan. 1, 1980, the effective date of NTL-4A, an application must be filed and approval received for any venting or flaring of gas beyond the initial 30-day or otherwise authorized test period. Produced gas which is vented or flared without prior authorization, approval, ratification, or acceptance is deemed to be avoidably lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the full value of the gas avoidably lost, or the allocated portion thereof attributable to the lease.

3. Administrative Procedure: Adjudication -- Administrative Procedure: Administrative Review -- Appeals: Jurisdiction

The jurisdiction of the Board of Land Appeals has been delegated by the Secretary of the Interior, and the scope of this Board's authority is stated in 43 CFR Part 4. The Board has not been empowered to rule on the merits of an affirmative defense that an appellant is protected under the bankruptcy laws because debt claims were not filed as a Proof of Claim with the U.S. Bankruptcy Court. The Bankruptcy Court is the proper forum for a determination on that issue.

APPEARANCES: Robert G. Pruitt, Jr., Esq., Salt Lake City, Utah, for Lomax Exploration Company.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Lomax Exploration Company (Lomax) has appealed from a February 11, 1987, decision of the Director, Utah State Office, Bureau of Land Management (BLM). That decision stated in pertinent part:

Our decision is to accept Order 196-11 issued September 23, 1982, whereby the State of Utah Board of Oil, Gas, and Mining authorized the flaring of gas from all of Lomax's wells "located in Duchesne County for an indefinite period or until otherwise ordered by the Board." This order has been subsequently updated and ratified. Therefore, you are advised that we have determined that gas was not avoidably lost in Duchesne County, with one exception.

You were advised on January 4, 1982, per Certified Mail - Return Receipt Requested to submit along with other information, an application for NTL-4A [Notice to Lessee] approval for Federal 1-1, lease U-40652, NE1/4NW1/4 Section 1, T. 9 S., R. 16 E. * * * For this referenced well, it is our determination that gas was avoidably lost from August 6, 1981, 1/ until September 23, 1982, which is the date of Order 196-11. * * *

For any and all of your wells in Uintah County, it is our further determination that gas was avoidably lost as no approval was given to vent or flare prior to approval granted September 1984. 2/

(Feb. 11, 1987, Decision at 1).

1/ The Federal 1-1 well was completed on Aug. 6, 1981.

2/ The file contains no accurate listing of the Lomax wells located in Uintah County on the date of the decision. However, the files pertaining to four Uintah County wells were forwarded to this Board: Well No. 16-7 (U-27041); Well No. 5-21 (U-30290); Well No. 15-8 (U-49656); and Well No. 2-20 (U-49656).

Lomax does not dispute the BLM finding that gas had been vented or flared at the wells in question. It contends that the engineer authorized to take action on behalf of BLM (and the Minerals Management Service (MMS), BLM's immediate predecessor in such matters) knew that gas was being vented or flared at the Federal 1-1 well and its wells in Uintah County. It argues that he had approved of and consented to flaring the gas, and thus, pursuant to policies and practice then in effect, the gas was not avoidably lost.

Lomax argues that the dispute is a direct result of certain changes in the management structure within the Department of the Interior. In January 1982, the operations on Federal lands administered by a District Engineer of the Conservation Division of the Geological Survey (GS) were transferred to the newly created MMS. In early 1984 these functions were again transferred to BLM. Lomax alleges that during the transition period when operations were overseen by MMS and the period when the BLM District Office was understaffed, there was a breakdown of internal procedures, and it was very difficult for an oil and gas operator to interpret and meet the Department's policy requirements. Lomax alleges that this period of confusion lasted from early 1982 through late 1984. ^{3/} Lomax notes that, during this same period, the basic rules governing oil and gas operations on Federal leases were extensively amended.

Lomax claims that the person serving as the GS District Engineer in 1982 became the MMS oil and gas operations supervisor, and ultimately became the Chief, Branch of Fluid Minerals, for the Utah State Office, BLM. However, according to Lomax, this person became seriously ill in 1984, retired, and passed away shortly after retirement. Lomax contends that this person had monitored its oil and gas operations and participated in the State gas flaring hearings, concurring in the various flaring decisions. Lomax contends that upon his retirement, his former authority was divided between the State and District offices.

Lomax states that in early 1972 the Utah Board of Oil, Gas, and Mining (Utah Board) issued an order to show cause why the flaring operations in Duchesne County should not be discontinued. After a hearing on the matter, the Utah Board issued its findings in an order issued on September 23, 1982. ^{4/} The Utah Board found that limited gas production from Lomax's oil wells and a lack of market demand for gas justified continued flaring of gas from "wells located in Duchesne County" and approval for flaring gas at those wells was granted (Order No. 196-11).

According to Lomax, on September 23, 1982, it had no wells in Uintah County which were producing or capable of flaring gas. Lomax also notes that the Utah Board order stated that it was to apply to Lomax wells in Duchesne County drilled after the date the order was issued. It argues that the September 23 order was to apply to all flaring in the general area

^{3/} Lomax alleges that this problem was compounded by the early retirement and reassignment of former GS/MMS personnel, leaving few experienced people in the field to interpret and coordinate the Department's policies.

^{4/} According to Lomax, a representative of the Department had attended these hearings. The BLM decision tends to confirm that assertion.

because the wells in Uintah County were in the same reservoir and producing horizon as those in Duchesne County. Lomax contends that all circumstances applicable to its Duchesne County wells are also applicable to its Uintah County wells, the only difference being that the Uintah wells were on the other side of a county line.

A second State Board hearing was held on March 16, 1984. As a result of the evidence adduced at this hearing, the Utah Board issued Order No. 196-13, superseding and revoking Order No. 196-11. In the new order, the Utah Board continued authorization of gas flaring from wells meeting gas-oil ratio criteria for a period of 6 months. The application of this order was subsequently extended for additional 6-month intervals. At some time after Order No. 196-13 was issued, Lomax installed several gathering pipelines and negotiated short-term gas sales contracts for many of its previously vented or flared wells. However, with the decline of oil prices Lomax was forced to cease drilling and its short-term sales agreements expired. Lomax states that when the contracts expired it was unable to find a market for its gas. As a result, according to Lomax, it was unable to generate sufficient gas to justify installing collecting pipelines to all of its flaring wells.

Lomax alleges that during the period between 1982 and 1984 it had routinely reported all vented or flared gas at each well site, responded to all demands or notices, successfully justified its gas-flaring activities before the Utah Board, and believed that it was in compliance with the regulations pertaining to flaring gas and other applicable Federal policies. Lomax states that in 1984, when it became aware of the BLM policy concerning venting and flaring gas, it immediately applied for formal approval of its flaring activities at all of its Duchesne and Uintah County wells, pursuant to NTL-4A.

The file contains a letter to BLM dated September 26, 1984, in which Lomax requests approval for Lomax to continue venting gas from the wells listed in the letter pursuant to the Utah Board's March 22, 1984, order. On October 5, 1984, the District Manager acknowledged receipt of Lomax's request and notified Lomax that it could not respond because Lomax had failed to include the well locations and lease numbers as a part of its request. On October 9, 1984, Lomax submitted the requested information. On November 2, 1984, BLM sent a letter to Lomax informing Lomax that "approval is hereby granted by this office to vent produced gas at the levels set forth in the Order established in Cause No. 196-13 until such time said order terminates." The basis for the BLM grant of approval was the same as that given by the Utah Board in its 1982 and 1984 orders.

According to Lomax, in early 1986 the Utah State Tax Commission asserted that Lomax owed \$ 124,002.71 for gas vented or flared without authorization in 1983. Lomax states that this was the first time it became aware that it required formal NTL-4A approval prior to flaring gas. It immediately sought retroactive approval of its flaring operations. Approval was granted for September 1984 and subsequent months, based upon the prior State approvals and, according to Lomax, "other factors known to the then current BLM personnel" (Statement of Reasons at 10).

Lomax contends that a problem regarding the grant of approval for other periods exists because the status of Lomax's wells during those periods was known only by the former engineer who had since died. According to Lomax, BLM's former employee had regularly attended and actively participated in the State hearings regarding gas flaring, Lomax had promptly and regularly reported its flaring operations to him, and at the time of BLM inspections of the wells gas was being vented or flared and no citations for flaring without prior permission had been issued. Lomax contends that it had scrupulously complied with the conditions of the State orders and had applied for and received approval as soon as it was made aware of the need to do so.

Lomax states that, after considering the information Lomax had presented to it, BLM confirmed the fact that its engineer had routinely attended the State hearings and seemed to be persuaded that the flaring operations had been approved for the Duchesne County wells, because the 1982 State order specifically mentioned them, but was not persuaded that the flaring operations had been approved for flaring at the Uintah County wells. According to Lomax, the BLM determination to arbitrarily "draw the line" at the county boundary is the essence of its appeal.

Lomax notes that in May 1986 the Utah State Tax Commission wrote Lomax claiming penalties totaling \$ 1,277,282.98 for unauthorized flaring at Lomax wells in both Duchesne and Uintah Counties. Further negotiation proved futile and, after a final decision was issued by BLM, Lomax appealed to this Board.

Lomax urges this Board to find that the 1982 Utah Board order is applicable to the wells in both Duchesne and Uintah Counties even though that order expressly refers to wells in Duchesne County. Lomax also raises an affirmative defense under the bankruptcy laws. Lomax claims that it is protected by an automatic stay in the Order for Relief under 11 U.S.C., Chapter 11, because the debt claims of MMS were not filed as a Proof of Claim with the U.S. Bankruptcy Court of the Southern District of Texas (Case No. 85-03159-H2-11).

[1] The starting point for an analysis of Lomax's obligation to pay royalties on the gas vented or flared at its wells is the provision at 43 CFR 3162.7-1. Subsection (a) of that regulation provides that "[t]he lessee shall put into marketable condition, if economically feasible, all oil, other hydrocarbons, gas, and sulphur produced from the leased land." Paragraph (d) of the same regulation states:

The lessee shall conduct operations in such a manner as to prevent avoidable loss of oil and gas. A lessee shall be liable for royalty payments on oil or gas lost or wasted from a lease, when such loss or waste is due to negligence on the part of the lessee of such lease, or due to the failure of the lessee to comply with any regulation, order or citation issued pursuant to this part.

43 CFR 3162.7-1(d).

The BLM decision on appeal held that the loss of vented or flared gas in Duchesne County subsequent to the date the Utah Board issued its findings was unavoidable, but that gas vented or flared at the Federal 1-1 well before the September 23, 1982, order and at its Uintah County wells prior to September 1984 was avoidably lost. Appellant argues that it was unable to sell gas produced at the Federal 1-1 well before the September 23, 1982, State Board order and at its Uintah County wells after the issuance of that order. It contends that the basis for the Utah Board findings applied to the wells in question with equal weight, and thus the gas vented or flared at those wells was also unavoidably lost. To determine the correctness of Lomax's contentions we must examine NTL-4A.

[2] The issuance of NTL's is authorized at 43 CFR 3161.2. The regulation at 43 CFR 3162.1(a) requires compliance "with applicable laws and regulations; with the lease terms, Onshore Oil and Gas Orders, NTL's; and with other orders and instructions of the authorized officer" (emphasis added). Because of the importance of NTL-4A to the outcome of this decision, we will quote from that notice at some length.

NTL-4A is specifically directed to the calculation of royalties or compensation for oil and gas which is lost by the operator. Under the heading "General," this notice provides:

No royalty obligation shall accrue on any produced gas which * * * (2) is vented or flared with the Supervisor's [5] prior authorization or approval * * *, (3) is vented or flared pursuant to the rules, regulations, or orders of the appropriate State regulatory agency when said rules, regulations, or orders have been ratified or accepted by the Supervisor, or (4) the Supervisor determines to have been otherwise unavoidably lost.

Where produced gas * * * is (1) vented or flared during drilling, completing, or producing operations without the prior authorization, approval, ratification, or acceptance of the Supervisor or (2) otherwise avoidably lost, as determined by the Supervisor, the compensation due the United States * * * will be computed on the basis of the full value of the gas so wasted, or the allocated portion thereof, attributable to the lease.

NTL-4A, published at 44 FR 76600 (Dec. 27, 1979).

Section II of NTL-4A contains definitions of the applicable terms. The definition applicable to this case is:

A. "Avoidably lost" production shall mean the venting or flaring of produced gas without the prior authorization, approval, ratification, or acceptance of the Supervisor and the loss of produced oil or gas when the Supervisor determines that such loss

5/ The term "authorized officer" is now used. This term has the same general meaning as the term "supervisor" in NTL-4A.

occurred as a result of (1) negligence * * * or (2) the failure * * * to take all reasonable measures to prevent and/or control the loss, or (3) the failure * * * to comply fully with the applicable lease terms and regulations * * *.

44 FR 76600 (Dec. 27, 1979).

Under the heading "IV. Other Venting or Flaring," NTL-4A provides:

B. Oil Well Gas. [O]il well gas may not be vented or flared unless approved in writing by the Supervisor. The Supervisor may approve an application for the venting or flaring of oil well gas if justified either by the submittal of (1) an evaluation report * * * which demonstrates to the satisfaction of the Supervisor that the expenditures necessary to market or beneficially use such gas are not economically justified and that conservation of the gas, if required, would lead to the premature abandonment of recoverable oil reserves and ultimately to a greater loss of equivalent energy than would be recovered if the venting or flaring were permitted to continue * * *.

* * * * *

* * * For oil wells completed on or after the effective date of this Notice, an application must be filed with the Supervisor, and approval received, for any venting or flaring of gas beyond the initial 30-day or otherwise authorized test period.

44 FT at 76601 (Dec. 27, 1979).

We find the regulations clearly grant the authority to issue NTL's. We also find the language of NTL-4A to be clear and unambiguous. Oil well gas may not be vented or flared unless that activity is approved in writing by an authorized officer. For oil wells completed on or after January 1, 1980, the effective date of NTL-4A, an application must be filed with an authorized officer, and approval received for any venting or flaring of gas beyond the initial 30-day or otherwise authorized test period. Venting or flaring of produced gas without prior authorization, approval, ratification, or acceptance is deemed to be avoidably lost. When produced gas is avoidably lost, the compensation due the United States is computed on the basis of the full value of the gas avoidably lost, or the allocated portion thereof attributable to the lease. F. Howard Walsh, Jr., 93 IBLA 297, 303 (1986).

Lomax does not allege that it obtained written permission to vent or flare gas from the Federal 1-1 well before the September 23, 1982, State Board order or at its Uintah County wells prior to the BLM approval granted in September 1984. We thus can find no basis for holding that BLM is not legally able to seek payment of royalties based upon the gas flared during those periods.

In addition, Lomax's contention that from early 1982 through late 1984 there was a breakdown of internal procedures within the Department, and that it was very difficult for an oil and gas operator to interpret and meet the Department's policy requirements is of little avail when held up to the clear and unambiguous requirements of NTL-4A that it seek written approval for its flaring activities. Assuming for the moment that Lomax had been misled by the engineer's tacit approval of its flaring activities, the engineer did not have authority to bind the Federal Government to that determination, unless and until approval was reduced to writing, either by acceptance of a direct request to vent or flare gas or ratification or acceptance of the rules, regulations, or orders of an appropriate State regulatory agency. See 43 CFR 1810.3. Lomax has tendered nothing to this Board which would support a determination that written approval was given for venting or flaring gas at the wells in question during the time in question. There is no way this Board can grant the relief Lomax seeks.

[3] We will now address the affirmative defense raised by Lomax. The jurisdiction of this Board has been delegated by the Secretary of the Interior, and the scope of this Board's authority is stated in 43 CFR Part 4. The Board has not been empowered to rule on the merits of the affirmative defense under the bankruptcy laws raised by Lomax. The proper forum for a determination on that issue is the Bankruptcy Court.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Chief Administrative Judge